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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN JOSE DIVISION**

15
16 IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

17 THIS DOCUMENT RELATES TO:
18 ALL ACTIONS
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20
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Master Docket No. 11-CV-2509-LHK

**DEFENDANTS' JOINT RESPONSE TO
PLAINTIFFS' ADMINISTRATIVE
MOTION TO FILE UNDER SEAL
PORTIONS OF PLAINTIFFS' MOTION
TO EXCLUDE EXPERT TESTIMONY
PROFFERED BY DEFENDANTS**

Pursuant to N.D. Cal. Civ. L.R. 7-11 and 79-5, defendants Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit Inc., Lucasfilm Ltd., and Pixar (collectively, “Defendants”) hereby jointly respond to Plaintiffs’ Administrative Motion to File Under Seal Portions of Plaintiffs’ Motion to Exclude Expert Testimony Proffered by Defendants and Declaration of Lisa J. Cisneros in Support Thereof (Dkt. 567) filed on January 9, 2014.

Defendants seek to seal portions of the following exhibits to the Declaration of Lisa J. Cisneros in Support of Plaintiffs’ Motion to Exclude Expert Testimony Proffered by Defendants and Memorandum of Law in Support (“Cisneros Declaration”): (1) Cisneros Declaration Exhibit 2 (Portions of the Expert Report of Lauren J. Stiroh); (2) Cisneros Declaration Exhibit 4 (Portions of the Expert Report of David Lewin); (3) Cisneros Declaration Exhibit 5 (Portions of the Expert Report of Elizabeth Becker); (4) Cisneros Declaration Exhibit 7 (Portions of the August 25, 2013 Expert Report of Kevin M. Murphy and supporting appendices); (5) Cisneros Declaration Exhibit 8 (Portions of the Amended Expert Report of Edward A. Snyder); (6) Portions of Exhibit 10 (Portions of the Expert Report of Eric Talley); and (7) Cisneros Declaration Exhibit 13 (Portions of the Rebuttal Supplemental Expert Report of Edward E. Leamer) (collectively, the “Sealed Materials”). The Sealed Materials have been designated Confidential or Attorneys-Eyes Only under the Stipulated Protective Order (Modified by the Court) (Dkt. No. 107). Defendants are filing corresponding declarations in support of their respective sealing requests.

I. LEGAL STANDARD

Rule 26(c) of the Federal Rules of Civil Procedure provides broad discretion for a trial court to permit sealing of court documents for, inter alia, the protection of “a trade secret or other confidential research, development, or commercial information.” Fed. R. Civ. P. 26(c)(1)(G). The Ninth Circuit has “carved out an exception to the presumption of access to judicial records for a sealed discovery document [attached] to a nondispositive motion,” where the requesting party shows good cause exists to keep the records under seal. *Navarro v. Eskanos & Adler*, No. C-06 02231, 2007 U.S. Dist. LEXIS 24864, at *6 (N.D. Cal. March 22, 2007) (citing *Kamakana*

1 *v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) (“[A] ‘particularized showing’
 2 under the ‘good cause’ standard of Rule 26(c) will ‘suffice[] to warrant preserving the secrecy of
 3 sealed discovery material attached to nondispositive motions.”); *see also Pintos v. Pacific*
 4 *Creditors Assoc.*, 565 F.3d 1106, 1115 (9th Cir. 2009) (“In light of the weaker public interest in
 5 nondispositive materials, we apply the ‘good cause’ standard when parties wish to keep them
 6 under seal.”).

7 8 **II. GOOD CAUSE EXISTS TO SEAL DEFENDANTS’ CONFIDENTIAL** **INFORMATION**

9 The redacted portions of the Sealed Materials contain confidential and commercially
 10 sensitive information about employee compensation, including Defendants’ compensation data,
 11 as well as information that reflects certain Defendants’ internal decision-making regarding their
 12 business strategies related to compensation and internal assessments of their and other
 13 employers’ competitive position in the labor market. Defendants also seek to keep under seal
 14 those materials that reflect compensation practices, strategies and policies; recruiting and hiring
 15 data, practices, strategies and policies; and personal identifying information of employees or
 16 candidates. Defendants designated the foregoing information “Confidential” or “Attorneys Eyes
 17 Only” under the Protective Order.

18 As each of the Defendants’ separately filed declarations demonstrate, Defendants kept the
 19 sealed information confidential and the public disclosure of this information would cause each
 20 Defendant harm by giving third-parties (including individuals responsible for competitive
 21 decision-making) insights into confidential and sensitive aspects of each of the Defendants’
 22 strategies, competitive positions, and business operations, allowing these third-parties to
 23 potentially gain an unfair advantage in dealings with and against each of the Defendants. A
 24 significant portion of the sealed information is employee compensation data. This type of
 25 information is regularly sealed because of its confidential and private nature. *See Renfro v.*
 26 *Unum*, No. 09-2661, 2010 BL 104197 (N.D. Cal. May 10, 2010) (granting a motion to seal
 27 records containing plaintiffs’ salary information); *Nettles v. Farmers Ins. Exch.*, No. C06-5164,
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1 2007 WL 858060, at *2, 2007 BL 247444 (W.D. Wash. Mar. 16, 2007) (holding that salary
 2 review notices for third parties “who have not chosen to have their salary history placed into the
 3 public record” could be sealed.); *EEOC v. Kokh, LLC*, No. CIV-07-1043, 2010 U.S. Dist. LEXIS
 4 82526, at n.1, 2010 BL 187807 (W.D. Okla. Aug. 09, 2012) (noting that portions of summary
 5 judgment materials were filed under seal because they contained “confidential salary
 6 information.”).

7 Similarly, compensation policies, practices and decisions are routinely subject to a
 8 sealing order. *In re Wells Fargo Loan Processor Overtime Pay Litigation*, No. C 07-01841, at
 9 *16, 2008 U.S. Dist. LEXIS 53616, 2008 BL 123131 (N.D. Cal. June 09, 2008) (noting that a
 10 “compensation policy” was filed under seal); *Hertz Equip. Rental Co. v. Useda*, No. CV-10-
 11 4953, 2010 BL 259718, at *2 (N.D. Cal. Nov. 02, 2010) (granting a temporary restraining order
 12 to enjoin a former employee from using a company’s “confidential and/or trade secret employee
 13 compensation information”).

14 In addition, good causes exists to seal confidential information relating to a company’s
 15 internal business, recruiting or hiring practices, strategies and policies, including confidential
 16 analyses of a company’s market position. *See* Fed. R. Civ. Proc. 26(c)(1)(G) (permitting sealing
 17 of “a trade secret or other confidential research, development, or commercial information”);
 18 *Krieger v. Atheros Commc’ns, Inc.*, Case No. 11-CV-00640, 2011 U.S. Dist. LEXIS 68033 at
 19 *3-4 (N.D. Cal. June 25, 2011) (holding that a company could seal a presentation from its
 20 investment adviser that contained “sensitive and confidential information, including long-term
 21 financial projections, discussions of business strategy, and competitive analyses”); *Network*
 22 *Appliance, Inc. v. Sun Microsystems Inc.*, Case No. C-07-06053, 2010 U.S. Dist. LEXIS 21721,
 23 at *9 (N.D. Cal. Mar. 10, 2010) (sealing “internal information regarding [defendant’s] business
 24 strategies and opportunities that were not widely distributed”); *see also TriQuint Semiconductor,*
 25 *Inc. v. Avago Techns. Ltd.*, Case No. CV 09-531, 2011 U.S. Dist. LEXIS 143942, at *9 (D. Ariz.
 26 Dec. 13, 2011) (granting motion to seal “market analysis information,” under “compelling”
 27 reason standard applicable to dispositive motions, including a “spreadsheet tracking information
 28

1 regarding potentially competitive products,” and other business strategy documents, such as
2 information relating to “product competitiveness, and market and technological opportunities
3 and risks”).

4 Additionally, good cause exists to seal information pertaining to Defendants’ recruiting
5 policies and practices that are proprietary business methods and/or trade secrets. This
6 confidential and commercially sensitive business information is non-public and should remain
7 confidential under Rule 26(c)(1)(G) (permitting sealing of “a trade secret or other confidential
8 research, development, or commercial information”); *see also* Cal. Civ. Code § 3426.1(d)
9 (defining trade secrets as information that “(1) Derives independent economic value, actual or
10 potential, from not being generally known to the public or to other persons who can obtain
11 economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable
12 under the circumstances to maintain its secrecy.”).

13 Good cause also exists for sealing the identities and personal contact information of
14 specific employees or applicants that are contained in the Sealed Materials. These employees or
15 applicants have not sought to make their identities known or placed in the public record. *Nettles*
16 at *2 (holding that the interests of private parties outweighed the public’s right of access with
17 respect to information pertaining to third party salary and employment separation information).

18 **III. CONCLUSION**

19 For the foregoing reasons, Defendants respectfully request that this Court order the
20 portions of the Sealed Materials identified in each Defendant’s declaration to be placed under
21 seal. In accordance with Civil Local Rule 79-5(d), a proposed order granting Defendants’
22 Response to Plaintiffs’ Administrative Motion to Seal will be lodged with the Clerk in hard copy
23 and served on counsel for Plaintiffs. In accordance with Civil Local Rule 79-5(d), Defendants’
24 proposed redacted versions of the Sealed Materials are being lodged with the Clerk in hard copy
25 showing proposed redacted portions highlighted in yellow within a sealed envelope.

1 Dated: January 13, 2014

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12 **ATTESTATION:** The filer attests that concurrence in the filing of this document has been
13 obtained from all signatories.
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